ADMISSION TO BAR DENIED FOR REFUSAL TO ANSWER QUESTIONS PERTAINING TO COMMUNIST AFFILIATIONS

In re Anastaplo
18 Ill. 2d 182, 163 N.E.2d 429 (1959)

Petitioner passed the Illinois bar examination given in August of 1950 and applied for a certificate of approval from the district Committee on Character and Fitness.[1] The committee denied approval because petitioner refused to answer questions put by the committee as to his possible membership in the Communist Party. Petitioner's motion for admission was denied by the Supreme Court of Illinois, which held that the committee had not, as petitioner asserted, abused its discretion nor violated his right of free speech under the due process clause of the fourteenth amendment by inquiring into political affiliations.[2] The United States Supreme Court denied *certiorari*.[3] Subsequent to the 1957 decisions of the United States Supreme Court in *Konigsberg v. State Bar of California*,[4] and *Schware v. Board of Bar Examiners*,[5] petitioner filed with the Committee on Character and Fit-

[1] Ill. Rev. Stat. c. 110, § 259.58 (1951) provides: Section IX. Committee on Character and Fitness: (1) The Supreme Court shall appoint a Committee on Character and Fitness in each of the Appellate Court districts of this State. . . . (2) Before admission to the bar each applicant shall be passed upon by the Committee in his district as to his character and moral fitness. . . . Each applicant shall appear before the Committee of his district . . . and shall furnish the Committee such evidence of his moral character and good citizenship as in the opinion of the Committee would justify his admission to the bar. (3) If the Committee is of the opinion that the applicant is of approved character and moral fitness, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar.

[2] *In re* Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954).

[3] *In re* Anastaplo, 348 U.S. 946 (1955).

[4] 353 U.S. 252 (1957). Petitioner, an applicant for admission to the California bar, had submitted considerable evidence of his good moral character. Petitioner's refusal to answer certain questions about his political associations and beliefs, however, was held by the state court to justify denying him admission on grounds of poor moral character. The United States Supreme Court found that during prolonged hearings on Konigsberg's application he was asked many questions as to his political affiliations and beliefs; these he declined to answer, explaining that his refusal was based on his understanding that, under the first and fourteenth amendments, a state could not inquire into such matters. Refusing to decide whether Konigsberg's constitutional objections were well founded the Court noted that "Prior decisions by this Court indicate that his claim that such questions were improper was not frivolous." 353 U.S. at 270. Consequently the Court held that it was not permissible to draw unfavorable inferences from his refusal to answer, as to his truthfulness, candor or general moral character.

[5] 353 U.S. 232 (1957). Petitioner, an applicant for admission to the New Mexico bar, submitted strong evidence of his good moral character. The reasons upon which the state relied as justifying refusal to admit him to practice were somewhat different from the *Konigsberg* case. It was shown, among other things, that he had admittedly been a member of the Communist Party from 1932 to 1940. Upon a consideration of

ness a supplementary petition for rehearing of his application for admission to the bar. Following extended hearings[6] the committee again denied approval, framing that denial in accordance with the relevant statutory provisions.[7] The Supreme Court of Illinois, on petition from this refusal of the committee to sign a favorable certificate for admission, held that by virtue of applicant's refusal to answer questions regarding possible Communist or other subversive affiliations, he failed to demonstrate the good moral character and general fitness necessary for admission to the bar.[8] The Supreme Court of the United States has scheduled oral arguments on the issue in the term beginning next October.[9]

Power over admission to the bar has long been vested in the judiciary of each state.[10] While the legislature may prescribe certain standards, the state court alone is responsible for determining whether an individual applicant is qualified for the practice of law within its jurisdiction.[11] The courts are almost unanimous in holding that admission to the bar is a privilege and not a right.[12] Consistent with this view special qualifications may be established for the bar. The long recognized limitation on this principle has been that any qualification must be related to a person's fitness as a lawyer.[13] The United States Supreme Court has held that an applicant is protected from arbitrary state action in denying admission to the bar by the due process and equal protection clauses of the fourteenth amendment.[14]

---

all the circumstances of applicant's birth, upbringing, and current character, the United States Supreme Court concluded that this fact did not justify a denial of admission to practice.

[6] There was no affirmative evidence that Anastaplo had ever been a member of the Communist Party. Petitioner submitted a number of impressive character affidavits and letters of reference testifying to his good moral character and general fitness to practice law. During the investigation by the committee, however, the petitioner had expressed his belief in the doctrine of revolution and the right of the people to overthrow the government by force of arms, if necessary. The court concluded that these views were not necessarily inconsistent with those held by many patriotic Americans, but that petitioner's refusal to disclose whether he was a Communist made impossible a determination as to whether the applicant could in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois.

[7] *Supra* note 1, "good moral character and general fitness to practice law. . . ."

[8] *In re* Anastaplo, 18 Ill.2d 182, 163 N.E.2d 429 (1959).

[9] The New York Times, May 3, 1960 p. 32.

[10] *Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1856). *Cf.* Ohio Rev. Code § 4705.01.

[11] *In re* McBride, 164 Ohio St. 419, 132 N.E.2d 113 (1956), *cert. den.* 351 U.S. 965 (1956); Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934); State *ex rel.* Thatcher v. Brough, 15 Ohio C.C.R. (n.s.) 97, *aff'd* 90 Ohio St. 382, 108 N.E. 1133 (1914). As to power of legislature respecting admission to bar, see Annot., 144 A.L.R. 150 (1943).

[12] Matter of Rouss, 221 N.Y. 81, 84, 116 N.E. 782 (1917) (Cardozo, J.); 7 C.J.S. "Attorney and Client" § 4(b) (1937).

[13] *Ex parte* Secombe, *supra* note 10.

[14] *In re* Summers, 325 U.S. 561 (1945). *Cf.* Weiman v. Updegraf, 344 U.S. 183

In all states the moral character and general fitness of applicants for the bar must be approved prior to their admission to practice.[15] These qualifications have always been deemed essential for an attorney, and it is the duty of the court to inquire into these matters before admitting attorneys to the bar.[16] The validity of such statutes rests on the need to insure the courts and the public that the lawyers with whom they are dealing possess such good moral character that they can be trusted and will uphold the law.[17] In passing upon the qualifications of an applicant for admission to the bar, the burden of proving good moral character rests upon the applicant.[18]

Where on the evidence or lack of evidence presented, the court finds that it cannot in good conscience grant its approval, the candidate is denied admission. To the extent that such a denial appears unjustified serious constitutional questions may be raised.[19] The standards for qualification cannot be so arbitrary as to have no reasonable relation to fitness.[20] But assuming that the standard is such an inoffensive one as "good moral character," the court may still protect an individual against an arbitrary application of the standard.[21] In the *Konigsberg* case,[22] the majority adroitly sidestepped a crucial constitutional issue: whether the petitioner was constitutionally entitled not to answer the questions asked by the examining committee.[23] Petitioner had premised his refusal to answer on his freedom of expression as guaranteed by the first amendment operating through the fourteenth. Until the Supreme Court speaks out on the questions so adeptly avoided, the full implications of the *Konigsberg* case will

(1952). The Summers holding was reasserted in *Konigsberg, supra* note 4, and *Schware,* 353 U.S. at 238-9, which held that "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

[15] Rules for Admission to the Bar (West Publishing Co., 33d ed., 1953). See *e.g.,* Ohio Supreme Court Rule of Practice XIV and Rules of the Supreme Court of the United States, Rule II; Annot., 64 A.L.R.2d 301 (1959).

[16] *In re* Thatcher, 80 Ohio St. 492, 89 N.E. 39 (1909); *In re* Palmer, 15 Ohio C.C.R. 94, *aff'd,* 62 Ohio St. 643, 58 N.E 1100 (1900).

[17] People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 350, 8 N.E.2d 941, 944 (1937); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919).

[18] *In re* Stepsay, 15 Cal.2d 71, 98 P.2d 489 (1940); Rosencranz v. Tidirington, 193 Ind. 472, 141 N.E. 58 (1923). Annot., 64 A.L.R.2d 301 at 311 (1959).

[19] Previous to the *Konigsberg* and *Schware* decisions, there was a general reluctance on the part of the Supreme Court to consider claims arising under the fourteenth amendment in state bar admission proceedings. See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

[20] *Cf. Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

[21] *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[22] *Supra* note 4.

[23] *Cf.* Watkins v. United States, 354 U.S. 178 (1958); and Sweezy v. New Hampshire, 354 U.S. 234 (1957), regarding freedom of expression before legislative investigating committees.

remain open to doubt.[24] The *Konigsberg* and *Schware* opinions imply that a state's refusal to admit a candidate to the bar violates the due process clause of the fourteenth amendment where there is no basis for a finding that the applicant has failed to meet the qualifications laid down by the state for persons seeking to become lawyers. The *Konigsberg* decision reveals that where an applicant "in good faith" refuses to answer questions considered by the examining board to be relevant to a determination of moral fitness, such refusal can at best be one item of evidence against him and the state cannot deny its approval when the other evidence before it sufficiently demonstrates the requisite qualifications for admission to the bar.[25]

Anastaplo's "good faith" in refusing to answer the questions put to him by the committee seems unquestionable. None of the information in the record supported an inference that he lacked good moral character and the evidence advanced on his behalf was equally, if not more compelling than that employed by Konigsberg.[26] Although the burden of proving good moral character still rests upon the applicant, in the absence of further development of the constitutional issues previously mentioned it seems unreasonable to say that Anastaplo has not sustained his burden of proof merely because he relied on his interpretation of his constitutional rights.[27]

John C. McDonald

---

[24] The opinion in the instant case endeavored to avoid the impact of the Konigsberg case by suggesting that it was not a final determination. The dissent points out that it is not the province of the United States Supreme Court to admit persons to membership to the bar of any state, but only to determine whether the actions and standards imposed by the state in bar admission cases infringed constitutional rights. On remand, the California Supreme Court, over the dissents of Justices Traynor and Peters, persisted in refusing Konigsberg admission to the bar. Konigsberg v. State Bar of California, 52 Cal. 2d 769, 344 P.2d 777 (1959). The case is again before the Supreme Court of the United States. Konigsberg v. State Bar of California, 4 L.Ed.2d 618, 80 S. Ct. 661 (1960). Both of these developments arose subsequent to the instant opinion in the Anastaplo case.

[25] 353 U.S. at 270-271: The Supreme Court held that as none of the questions asked by the committee had any relation to the statutory requirements (i.e., good moral character), his refusal to answer these questions did not evidence his failure to prove his good moral character. The Bar Committee could not refuse the applicant on the grounds that he had not sustained his burden of proof in meeting the strict statutory requirements. "If and when a state makes failure to answer a question an independent ground for exclusion from the Bar, then this Court will have to determine whether the exclusion is constitutionally permissible."

[26] *In re* Anastaplo, 18 Ill.2d 182, 163 N.E.2d 429 (1959), Schaefer and Davis, J.J., dissenting (unreported): "The record suggests nothing derogatory as to his character or his reputation. The affirmative showing of good character and reputation is entirely convincing. . . . The applicant possesses the requisite qualifications for admission to the bar."

[27] *Supra* note 4. *Cf.* United States v. Rumely, 345 U.S. 41, 48 (1953) (concurring opinion); Thomas v. Collins, 323 U.S. 516, 531 (1945); West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940); DeJonge v. Oregon, 299 U.S. 353, 365-366 (1937).